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Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

GREGORY D. BOLIN,

Petitioner,

v.

E.K. MCDANIEL, WARDEN OF ELY STATE PRISON

THE STATE OF NEVADA,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Nevada

APPENDIX

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF NEVADA

GREGORY BOLIN, Appellant, vs. THE STATE OF NEVADA Respondent.	No. 45383

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Nancy M. Saitta, Judge.

On October 2, 1996, the district court convicted appellant Gregory Bolin, pursuant to a jury verdict, of first-degree kidnapping, sexual assault, and first-degree murder. The jury returned a verdict of death for the murder. This court affirmed the judgment of conviction and sentence of death.[1] The United States Supreme Court denied Bolin's petition for a writ of certiorari on March 1, 1999. Bolin subsequently filed the instant petition, which the district court denied on July 11, 2005, without conducting an evidentiary hearing. This appeal followed.

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[1] Bolin v. State, 114 Nev. 503, 960 P.2d 784 (1998), abrogated in part by Richmond v. State, 118 Nev. 924, 59 P.3d 1249 (2002); see also Ledbetter v. State, 122 Nev. 252, 129 P.3d 671 (2006).

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First, Bolin claims the district court erred by denying his claim that be was entitled to a new trial based on the erroneous admission of evidence of his prior Colorado conviction for kidnapping and sexual assault. The district court ruled that this evidence was proper to show identity and sexual aberration and for other purposes. The district court instructed the jury that it could consider the evidence in deciding whether Bolin possessed a propensity for sexual aberration. Bolin argued in his direct appeal that the evidence was improperly admitted. We held that the evidence was properly admitted to show identity;[2] consequently, we declined to consider whether the evidence was improperly admitted for any other purpose, including to show a propensity for sexual aberration.[3]

The State argues that this claim is barred by the law of the case doctrine.[4] We disagree. In Bolin's direct appeal, we expressly declined to consider whether evidence of the prior bad act was improperly admitted to show sexual aberration. Thus, the claim is not barred by the law of the case. The claim was not waived because Bolin raised it in his direct appeal, and his petition is not successive, so the procedural bars of NRS 34.810 are not at issue. Bolin argues that our decisions in Braunstein v. State[5] and Richmond v. State,[6] which were both decided after

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[2] Id. at 520-21, 960 P.2d at 795-96.

[3] Id. at 521 n.5, 960 P.2d at 796 n.5.

[4] See Pellegrini v. State, 117 Nev. 860, 879, 34 P.3d 519, 532 (2001); Hall v. State, 91 Nev. 314, 316, 535 P.2d 797, 799 (1975).

[5] 118 Nev. 68, 40 P.3d 413 (2002).

[6] 118 Nev. 924, 59 P.3d 1249 (2002).

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Ms conviction became final, entitle him to relief on this claim.

The State argues that Bolin is not entitled to application of Braunstein and Richmond because his conviction was final when those cases were decided and they do not demand retroactive application on collateral review.[7] We need not reach this issue here because even if those cases were applied retroactively to Bolin, they would not entitle him to relief. Braunstein would not have barred admission of the prior bad act evidence; the evidence would still have been admissible to show identity, which we have already ruled was proper. And while Richmond would have rendered the sexual-aberration jury instruction improper, we conclude the error in giving the instruction would have been harmless in light of the weight of the evidence supporting Bolin's conviction. That evidence included Bolin's history of frequenting the victim's place of work and asking the victim and her sisters out on dates; surveillance videotape placing Bolin at the victim's place of work minutes before she arrived and approximately two hours before she departed on the night of her death; a witness who saw Bolin drive away from the crime scene in the victim's truck just before the witness discovered the dying victim; the victim's truck being found five blocks from Bolin's home with a bloody screwdriver inside; and evidence that Bolin was included among the one in every 2,400-2,600 African-Americans who could have been the donor of DNA evidence found on the victim's body. Thus, we

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[7] See generally Colwell v. State, 118 Nev. 807, 59 P.3d 463 (2002).

conclude the district court did not err in denying this claim.

Bolin also claims his trial and appellate counsel were ineffective with regard to the prior bad act evidence and sexual aberration jury instruction. To state a claim of ineffective assistance of counsel sufficient to invalidate a judgment of conviction, a petitioner must demonstrate that counsel's performance fell below an objective standard of reasonableness and that counsel's errors were so severe that they rendered the jury's verdict unreliable.[8] "To establish prejudice based on the deficient assistance of appellate counsel; the defendant must show that the omitted issue would have a reasonable probability of success on appeal."[9] We conclude the district court did not err in ruling that counsel were not ineffective. Trial counsel filed a pre-trial motion to exclude prior bad acts, and appellate counsel raised this issue on direct appeal. Neither counsel was deficient for failing to cite Braunstein and Richmond when those cases had not yet been decided.

Second, Bolin claims the district court erred by denying his claim that the DNA evidence should have been excluded as inconclusive and therefore irrelevant; Bolin also claims that the State's evidence and argument about the related statistical probabilities should have been excluded as a result. We concluded in Bolin's direct appeal that the DNA

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[8] See Strickland v. Washington, 466 U.S. 668 (1984); Warden v. Lyons, 100 Nev. 430, 683 P.2d 504 (1984).

[9] Kisksey v. State, 112 Nev. 980, 998, 923 P.2d 1102, 1114 (1996).

evidence and related statistics were proper. That ruling is now the law of the case.[10] The doctrine of the law of the case cannot be avoided by a more detailed and precisely focused argument made after reflection upon the prior proceedings.[11] Accordingly, we conclude the district court did not err in denying this claim.

Bolin also argues that his counsel were ineffective for failing to challenge the DNA and statistical probability evidence by arguing that its inconclusiveness rendered it irrelevant. Bolin failed to establish that counsel's performance was deficient or prejudiced him. The State's expert witness testified that she found DNA evidence on the root and shaft of a foreign pubic hair recovered from the victim's body. She testified that a hair root would contain DNA, while the shaft would not, and thus, the DNA on the shaft must have been deposited there. She further testified that the DNA profiles she obtained from the root and the shaft were the same, but she could not determine whether the DNA on the shaft had been deposited there by the root, had come from somewhere else on the donor, or came from an entirely different donor with the same profile. She also testified that 1 in approximately 2,600 African-American males, including Bolin, would fit that profile. Her testimony that she could not draw a conclusion on how the DNA got on the shaft of the hair did not render the whole of the DNA evidence inconclusive or irrelevant. The jury was capable of assessing the proper weight to give this evidence. We

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[10] See Pellegrini, 117 Nev. at 879, 34 P.3d at 532.

[11] Hall, 91 Nev. at 316, 535 P.2d at 799.

note that trial counsel called its own DNA expert to testify as well. Thus, we conclude the district court did not err in denying this claim.

Third, Bolin contends the district court erred in denying his claim that the State violated Brady v. Maryland[12] by failing to disclose a second, lighter pubic hair recovered from the victim's body and by failing to preserve the first, darker pubic hair, which was tested, for independent analysis by the defense. Bolin also argues his counsel were ineffective for failing to investigate this issue during trial and for failing to raise this argument on direct appeal.

To the extent Bolin raises this claim as a direct appeal claim, it was waived by his failure to raise it on direct appeal.[13] As an ineffective assistance of counsel claim, Bolin failed to establish that counsel's performance was ineffective. Brady and its progeny require a prosecutor to disclose exculpatory evidence that is material to the defense.[14] A claim that the State committed a Brady violation must show that: the evidence at issue was favorable to the accused; the State failed to disclose the evidence, either intentionally or inadvertently; and prejudice ensued, i.e., the evidence was material.[15] Here, the State disclosed the existence of the lighter hair though it did not preserve it. It also disclosed the darker hair though it consumed the hair's root in testing it. Bolin does not allege that the State acted in bad faith, and

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[12] 373 U.S. 83 (1963).

[13] See NRS 34.810(1)(b)(2).

[14] See Strickler v. Greene, 527 U.S. 263, 280 (1999).

[15] Id. at 281-82.

he merely speculates that either hair might have exculpated him. Such speculation is not sufficient to support a Brady claim or a claim of improper loss of evidence or to demonstrate counsel's deficiency or prejudice, and we conclude the district court did not err in denying this claim,

Fourth, Bolin contends that the district court erred in denying his claim that a witness identified him after an unduly suggestive show-up procedure and that the show-up tainted the witness's subsequent in-court identification of Bolin; thus, Bolin argues, both identifications should have been excluded, at trial. In Bolin's direct appeal, we concluded that the show-up procedure was not improper. This ruling is now the law of the case and will not be revisited.[16] Bolin also argues that the district court erred in denying his claim that this court misapprehended the facts relating to this claim in his direct appeal. This claim was not properly brought in a postconviction petition for a writ of habeas corpus. We note that after this court decided his direct appeal, Bolin unsuccessfully sought rehearing.[17] Bolin also argues his counsel were ineffective for failing to challenge the identifications. As we have already ruled that the show-up procedure was not improper, Bolin failed to demonstrate that counsel's performance prejudiced him. Bolin further argues that trial counsel were ineffective for failing to object to testimony by the witness who observed him at the crime scene that he recognized Bolin's face, even though the witness had

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[16] See Pellegrini, 117 Nev. at 879, 34 P.3d at 532.

[17] Bolin v. State, Docket No. 29497 (Order Denying Rehearing, August 27, 1998).

also testified that he did not see Bolin's face. We conclude counsel was not ineffective. Our review of the record indicates that the witness testified that at the crime scene he saw Bolin's face in profile but not straight-on. The State questioned the witness about these facts, and the jury was capable of assessing the witness's credibility and weighing his identification of Bolin. Thus, the district court did not err in denying these claims.

Fifth, Bolin contends the district court erred in denying his claim that the search warrant was invalid because the affidavit supporting it contained material misrepresentations of fact and did not establish probable cause. Bolin also argues the State violated his constitutional rights by conducting a second blood thaw from Bolin without obtaining a second search warrant after realizing it had used the wrong serology kit in the first blood draw. In Bolin's direct appeal, this court ruled that the affidavit provided a substantial basis for finding probable cause and that the second blood draw was not improper. This ruling is now the law of the case and will not be revisited.[18] The law of the case doctrine cannot be avoided by a more detailed and precisely focused argument made after reflection on the prior proceedings.[19] Bolin also argues his trial counsel were ineffective for failing to adequately challenge the warrant and searches. As we have already ruled that the warrant and searches were not improper, Bolin failed to demonstrate that counsel's performance prejudiced him. Thus, the district court did not err in denying these claims.

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[18] See Pellegrini, 117 Nev. at 879, 34 P.3d at 532.

[19] Hall, 91 Nev. at 816, 535 P.2d at 799.

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Sixth, Bolin claims his trial counsel were ineffective at sentencing for failing to call his family members and friends to testify in mitigation that they loved Bolin and would suffer as a result of the imposition of the death penalty, that Bolin was committed to his education, and that he had a relationship with his son. Bolin did not raise this argument below and alleges no cause for his failure to do so. Further, in light of the facts of this case, Bolin failed to establish that counsel's performance prejudiced him. Accordingly, the district court did not err in denying this claim.

Finally, Bolin argues that' the district court erred by denying his petition without conducting an evidentiary hearing. We disagree. Bolin failed to state any facts that, if true, would entitle him to relief.[20]

ORDER the judgment of the district court AFFIRMED.

_____, J.	_____, J
Gibbons	Hardesty
_____, J.	_____, J
Parraguire	Douglas
_____, J.	
Cherry	

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[20] See Mann v. State, 118 Nev. 351, 354, 46 P.3d 1228, 1230 (2002).

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APPENDIX B

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DISTRICT COURT
CLARK COUNTY, NEVADA

THE STATE OF NEVADA, Plaintiff, vs. GREGORY D. BOLIN, #1218913 Defendant.	CASE NO: C130899 Dept No: XVIII

AMENDED

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

THIS CAUSE having come on for hearing before the Honorable NANCY M. SAITTA, District Judge, on the 11th day of May, 2005, and the 27th day of July, 2005, the Petitioner not being present, represented by MELINDA EADES, ESQ., the

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Respondent being represented by DAVID ROGER, District Attorney, by and through STEVEN S. OWENS, Chief Deputy District Attorney, and the Court having considered the matter, including briefs, transcripts, arguments of counsel, and documents on file herein, now therefore, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. This case began on July 18, 1995, when the defendant was arrested and, subsequently, he was tried in the district court, found guilty of first degree kidnapping, sexual assault and murder in the first degree. That took place on or about July 15th of 1996.

2. Thereafter, the penalty phase was convened and the jury found that the aggravating circumstances in this case outweighed the mitigating circumstances and they sentenced the defendant to death.

3. Thereafter, a series of post-conviction matters arose, including a direct appeal to the Supreme Court that by written order affirmed or upheld the conviction and the sentence of death. Bolin v. State, 114 Nev. 503, 960 P.2d 784 (1998).

4. The defendant then filed a petition for writ of certiorari to the United States Supreme Court. On March 1st of 1999 that petition was denied. Bolin v. Nevada, 525 U.S. 1179, 119 S.Ct. 1117 (1999).

5. Finally, on April 22, 1999, the defendant filed a petition for writ of habeas corpus dealing with post-conviction. There was an amended writ filed in May of 2000, a supplemental petition for the writ on

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March 3, 2003, and the corrected supplemental petition that was filed on March 26th of 2003.

6. The facts of the underlying crime are adequately reported in the written decisions rendered by higher courts in this case.

CONCLUSIONS OF LAW

1. Based upon Colwell v. State, 118 Nev. Adv. Op. 80, 59 P.3d 463 (2002) and Richmond v. State, 118 Nev. Adv. Op. 94, 59 P.3d 1249 (2002), this court finds that Braunstein v. State, 118 Nev. Adv. Op. 8, 40 P.3d 413 (2002) announced a new rule of law relative to the admission of evidence of sexual aberration at a time when Bolin's case was already final on appeal and his writ of certiorari had been denied. New rules of law are generally not applied retroactively and this court finds that retroactive application of Braunstein is inappropriate in this case.

2. Issues two and ten of the petition concern alleged errors by the Nevada Supreme Court on appeal. This court does not have the authority to overrule the Nevada Supreme Court and moreover, decisions made by the Nevada Supreme Court constitute law of the case and can not be re-litigated in these proceedings. Hence, grounds two and ten are denied as without a legally cognizable basis in law.

3. In order to assert a claim for ineffective assistance of counsel a defendant must prove that he was denied "reasonably effective assistance" of counsel by satisfying the two-prong test of Strickland v. Washington, 466 U.S. 668, 686-87, 104 S.Ct. 2052, 2063-64 (1984). Under this test, the defendant must show first that his counsel's representation fell below

an objective standard of reasonableness, and second, that but for counsel's errors, there is a reasonable probability that the result of the proceedings would have been different. There is a strong presumption that counsel's performance was reasonable and fell within "the wide range of reasonable professional assistance." United States v. Aguirre, 912 F.2d 555, 560 (2d Cir. 1990); citing Strickland, 466 U.S. at 689, 104 S.Ct. at 2065.

4. Having reviewed both the allegations of error constituting ineffective assistance of counsel at the trial level, as well as the appellate level, this court finds that a number of the suggestions of error are tactical decisions made by trial, as well as appellate counsel. Strategy and tactical decisions of counsel are virtually unchallengeable absent extraordinary circumstances. Doleman v. State, 112 Nev. at 846, 921 P.2d at 280; see also Howard v. State, 106 Nev. 713, 722, 800 P.2d 175, 180 (1990); Strickland, 466 U.S. at 691, 104 S.Ct. at 2066.

5. In regards to challenging the forensic evidence in this case, namely two hairs that were at issue, this court finds that there was significant testimony and appropriate challenges in cross-examination of both the State's witnesses, as well as defense experts that were available here at the time of trial and that there is no error that can be assigned for ineffective assistance of counsel with respect to the forensic evidence.

6. In regards to challenging the bad act evidence consisting of defendant's 1975 convictions for rape and kidnapping, the record in this case clearly reflects that a Petrocelli hearing was held. Furthermore, trial counsel filed a pre-trial motion to

exclude the bad acts and submitted a jury instruction to the court which would have eliminated the sexual aberration language. This court finds no evidence of ineffective assistance of counsel in the challenging of the bad act evidence.

7. The trial court carefully weighed and determined in its own mind whether or not the criteria of Petrocelli had been met. The trial court properly found that the defendant's bad act was relevant to the crime charged, that it had been proved by clear and convincing evidence, and that its probative value was not substantially outweighed by danger of unfair prejudice. The prior bad acts were admissible pursuant to NRS 48.045(2) and this issue was dealt with substantially on appeal and becomes law of the case.

8. With respect to ineffective assistance of counsel relating to the alleged failure of trial counsel to object to the eyewitness identification, this court finds that there was no error in that identification and again, would note that this matter had been raised on a direct appeal to the Nevada Supreme Court and becomes law of the case. There has been no showing of ineffective assistance of counsel with respect to the cross-examination of the eyewitness and the challenging of the show-up identification.

9. In regards to the issues relating to DNA statistical probability, this was raised on direct appeal, but moreover, this court finds that there was both State and defense experts that testified with respect to that statistical analysis and that the reliability of the comparison, the type of test, as well as the trial process which the defendant's counsel went through at the time of trial was not in any way

violative of constitutional rights, that it is not in any way to be considered as a performance that was ineffective in any way.

10. In regards to the issues relating to the search warrant and the taking of samples from defendant on two occasions, this court finds the issue to be without merit. Trial counsel filed two separate motions that challenged the sufficiency and validity of the search warrant and, not only did the district court hear oral arguments and make decisions on those motions, but this was an issue that was raised again before the Supreme Court on appeal and becomes law of the case.

11. This court finds that there was no error in the manner in which trial counsel presented or argued defendant's alibi defense dealing with the two individuals that the defendant claimed he was with on the night of the murder. This issue is without merit.

12. This court does not find based upon Strickland. based upon Braunstein or based upon any of the related law that the arguments raised by the petition would give rise to the suggesting that there be reversal of defendant's conviction and the sentence. The hair analysis and DNA testimony was only a small part of what appeared to be rather substantial other evidence that the jury certainly may have been able to have come to their decision on even with or without the DNA error alleged. None of the alleged errors would have made a difference in the outcome of this case. Because defendant has failed to assert claims supported by specific factual allegations not belied by the record, that if true, would entitle him to relief, no evidentiary hearing is warranted.

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13. Finally, this court finds the individual suggestions of error and/or instances of ineffective assistance of counsel taken together still do not rise to the level of cumulative error. The evidence against defendant was significant and any errors were not so substantial that reversal is in order. This court is not inclined to find cumulative error especially where a majority of these issues have been raised and decided by the Supreme Court and were denied.

ORDER

THEREFORE, IT IS HEREBY ORDERED that the Petition for Writ of Habeas Corpus (Post-Conviction Relief) shall be, and it is, hereby denied.

DATED this 27 day of July, 2005.

_____
DISTRICT JUDGE

DAVID ROGER

DISTRICT ATTORNEY
Nevada Bar #002781

BY _____
STEVEN S. OWENS
Chief Deputy District Attorney
Nevada Bar #04352